HUANG MIN & ORS v.
MALAYSIAN AIRLINE SYSTEM BHD & ORS

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
VERNON ONG LAM KIAT JCA
ABDUL RAHMAN SEBLI JCA
[CIVIL APPEAL NO: W-01(IM)(NCVC)-330-08-2016]
6 JULY 2017

CIVIL PROCEDURE: *Stay of proceedings – Application for – Actions commenced by plaintiffs outside jurisdiction against same defendants – Action subsequently filed in Malaysia as protective writ to preserve cause of action – Application to add defendants in Malaysian action – Application for stay of proceedings pending disposal of suit outside jurisdiction – Special circumstances – Whether there were special circumstances to justify grant of stay – Whether protective writ gave rise to special circumstances – Whether grant of stay would prejudice additional defendants*

The appellants were the next of kin of the passengers of Malaysia Airlines aircraft with flight code MH370 ('flight MH370'). On 29 January 2015, the Government of Malaysia declared, *inter alia*, that all passengers and crew onboard flight MH370 were presumed to have lost their lives. On 4 February 2016, the appellants commenced a civil action against the first to third respondents in the District Court of the Southern District of New York for the wrongful death of the decedents on flight MH370. Subsequently, the appellants filed an action at the Kuala Lumpur High Court ('Malaysian action') as a protective writ against the first to third respondents. On 4 March 2016, the appellants amended the Malaysian action to include the fourth to seventh respondents. The appellants then filed an application for a stay of the Malaysian suit pending determination by the US court of the jurisdictional challenge mounted by the first to third respondents in the US suits. In dismissing the application, the Judicial Commissioner ('JC') held, *inter alia*, that: (i) the protective nature of the writ in the Malaysian action did not itself give rise to special circumstances to justify a stay of proceedings; and (ii) if stay was allowed, there would be serious prejudice to have the Malaysian action hanging over the heads of the fourth to seventh respondents who were not parties to the US suits. Hence, the present appeal.

Held (dismissing appeal)
Per Abdul Rahman Sebli JCA (for the majority):

(1) There can be no argument that the uncertainty as to the direction in which the US court will rule on the jurisdictional issue raised by the first to third respondents in the US suits will negatively impact the expeditious disposal of the Malaysian suit. There was no reason why the progress of the Malaysian suit should be forestalled merely because the US court has yet to decide on the jurisdictional issue. The Malaysian court is not subordinate to the US court. (para 48)

(2) There was no application by the first and second respondents to restrain the appellants from pursuing the US suits, nor was there a direction given by the High Court, by its own motion or by application, to order the appellants to elect their forum but this did not mean that the JC must, as a matter of course, grant the order for stay of the Malaysian suit. Further, the appellants had made their position clear that if the US court were to decide that it was seized with jurisdiction to hear the US suits and will assume jurisdiction, they will drop the Malaysian suit against the first to third respondents. But again this did not mean that the appellants were entitled as of right to a stay of the Malaysian suit. The simple truth was, the expeditious disposal of the Malaysian suit would be compromised if a stay were to be granted while waiting for the US court to decide on the jurisdictional issue. (paras 49-51)

(3) It was manifestly unfair to the respondents, particularly the fourth to seventh respondents as they were not parties to the US suits, yet they were made to wait for the outcome of the jurisdictional issue raised by the first to third respondents in the US court. There was no merit in the appellants' contention that since the fourth to seventh respondents did not file any affidavit to show prejudice, they were precluded from raising the issue of prejudice. The fact that the Malaysian suit would be hanging over their heads for an indefinite period while waiting for the jurisdictional issue to be determined by the US court spoke for itself. (para 52)

(4) Although the appellants' explanation that the purpose of filing the protective writ was to protect their rights under the Malaysian law of the jurisdictional challenge by the first to third respondents in the US suits was palpable, this did not constitute a sufficient ground to justify putting the progress of the Malaysian suit on hold. Looking at the matter globally, the JC had not exercised his discretion on a wrong principle. Further, if stay was granted, the disadvantages to the respondents would outweigh the benefits to the appellants. (para 56)

Per Vernon Ong Lam Kiat JCA (dissenting):

(1) The JC erred in law and in fact in holding that the protective nature of the Malaysian action did not of itself give rise to special circumstances, and in further balancing the policy considerations between an expeditious disposal of the case and the prevention of multiplicity of proceedings. The stay that was sought was only an interim stay pending the outcome of the jurisdictional issue in the USA action. Although it was not possible to predict how long before it will be before the issue is finally adjudicated in the USA action, the time scale was not entirely in the air because the parties have been given timelines for discovery to determine the issue of jurisdiction. (para 80)

(2) In the absence of any affidavit in opposition, there was no material before the JC to support or justify his finding that potential prejudice might be occasioned to the fourth to seventh respondents. The JC made an unwarranted deduction based on an erroneous judicial reasoning which was unsupported by any affidavit evidence. The appeal was allowed with costs. (para 81)

Bahasa Malaysia *Headnotes*

Perayu-perayu merupakan keluarga terdekat penumpang-penumpang pesawat Malaysia Airlines dengan kod penerbangan MH370 ('penerbangan MH370'). Pada 29 Januari 2015, Kerajaan Malaysia mengisytiharkan, antara lain, bahawa semua penumpang dan anak kapal pesawat MH370 dianggap kehilangan nyawa mereka. Pada 4 Februari 2016, perayu-perayu memulakan tindakan sivil terhadap responden pertama hingga ketiga di Mahkamah Daerah di Daerah Selatan New York untuk kematian secara salah penumpang-penumpang pesawat MH370. Selepas itu, perayu memfailkan tindakan di Mahkamah Tinggi Kuala Lumpur ('tindakan di Malaysia') sebagai writ pelindung terhadap responden pertama hingga ketiga. Pada 4 Mac 2016, perayu meminda tindakan Malaysia untuk memasukkan responden keempat hingga ketujuh. Perayu-perayu kemudian memfailkan permohonan menangguhkan tindakan di Malaysia sementara menunggu keputusan Mahkamah Amerika Syarikat mengenai cabaran bidang kuasa yang diketengahkan oleh responden pertama hingga ketiga dalam tindakan Amerika Syarikat. Dalam menolak permohonan, Pesuruhjaya Kehakiman ('PK') memutuskan, antara lain, bahawa: (i) sifat writ perlindungan dalam tindakan di Malaysia tidak menimbulkan keadaan khas untuk membenarkan penangguhan prosiding; dan (ii) jika penangguhan dibenarkan, responden keempat hingga ketujuh akan terprejudis secara serius kerana tindakan di Malaysia akan tergantung atas responden keempat hingga responden ketujuh yang tidak dijadikan pihak dalam guaman Amerika Syarikat. Oleh itu, rayuan ini.

Diputuskan (menolak rayuan dengan kos)
Oleh Abdul Rahman Sebli HMR (keputusan majoriti):

(1) Tidak boleh dipertikaikan bahawa ketidakpastian keputusan mahkamah Amerika Syarikat mengenai isu perundangan yang dibangkitkan oleh responden pertama hingga ketiga dalam guaman Amerika Syarikat akan memberi kesan negatif terhadap pelupusan pantas tindakan di Malaysia. Tidak ada sebab kenapa progres tindakan di Malaysia harus dihalangi semata-mata kerana Mahkamah Amerika Syarikat masih belum memutuskan mengenai isu bidang kuasa. Mahkamah Malaysia bukan rendah daripada mahkamah Amerika Syarikat.

(2) Tiada permohonan oleh responden pertama hingga kedua untuk menghalang perayu daripada memulakan guaman Amerika Syarikat, dan tiada arahan diberikan oleh Mahkamah Tinggi, secara kendiri atau melalui permohonan, untuk mengarahkan perayu memilih forum mereka tetapi ini tidak bermakna PK harus memberi perintah penangguhan tindakan di Malaysia. Selanjutnya, perayu telah menjelaskan bahawa jika mahkamah Amerika Syarikat memutuskan mempunyai bidang kuasa mendengar guaman Amerika Syarikat dan akan mengambil alih bidang kuasa, mereka akan menggugurkan tindakan di Malaysia terhadap responden pertama hingga ketiga. Tetapi sekali lagi ini tidak bermakna bahawa perayu berhak diberikan penangguhan tindakan di Malaysia. Kebenarannya adalah, pelupusan tindakan di Malaysia yang pantas akan dikompromi jika penangguhan dibenarkan sementara menunggu mahkamah Amerika Syarikat membuat keputusan mengenai isu bidang kuasa.

(3) Adalah tidak adil buat responden, terutamanya responden keempat hingga ketujuh, kerana mereka bukan pihak dalam tindakan di Amerika Syarikat, namun mereka terpaksa menunggu keputusan isu bidang kuasa yang dibangkitkan oleh responden pertama hingga ketiga di Mahkamah Amerika Syarikat. Tiada merit dalam hujahan perayu bahawa oleh kerana responden keempat hingga ketujuh tidak memfailkan sebarang afidavit untuk menunjukkan prejudis, maka mereka dihalang daripada menimbulkan isu prejudis. Fakta bahawa tindakan di Malaysia akan tergantung atas responden keempat hingga ketujuh untuk tempoh yang tidak diketahui sambil menunggu isu bidang kuasa yang akan ditentukan oleh mahkamah Amerika Syarikat menerangkan situasi secara sendiri.

(4) Walaupun penjelasan perayu bahawa tujuan memfailkan writ pelindung adalah untuk melindungi hak mereka bawah undang-undang Malaysia, cabaran bidang kuasa oleh responden pertama hingga ketiga dalam guaman Amerika Syarikat dapat dipastikan, ini tidak menjadi alasan yang mencukupi untuk membenarkan penangguhan tindakan Malaysia. Melihat kes secara global, PK tidak melaksanakan budi bicaranya terhadap prinsip yang salah. Selanjutnya, penangguhan dibenarkan, kerugian responden akan melebihi manfaat perayu.

Oleh Vernon Ong Lam Kiat HMR (menentang):

(1) Pesuruhjaya Kehakiman terkhilaf bawah undang-undang dan fakta dalam memutuskan bahawa sifat pelindung tindakan Malaysia tidak dengan sendirinya menimbulkan keadaan khusus, dan selanjutnya dalam mengimbangi pertimbangan polisi antara pelupusan kes yang pantas dan pencegahan kepelbagaian prosiding. Penangguhan yang dipohon hanyalah penangguhan interim sementara menunggu keputusan bidang

kuasa dalam guaman Amerika Syarikat. Walaupun tidak mungkin boleh untuk meramal berapa lama barulah isu ini akan diselesaikan dalam tindakan Amerika Syarikat, skala masa tidak sepenuhnya diutamakan kerana pihak-pihak telah diberi tempoh masa untuk penemuan bagi menentukan isu bidang kuasa.

(2) Tanpa apa-apa afidavit yang bertentangan, tidak ada material di hadapan PK untuk menyokong atau membenarkan dapatannya bahawa kemungkinan prejudis akan terjadi pada responden keempat hingga ketujuh. Pesuruhjaya Kehakiman telah membuat pengetepian yang tidak berasas berdasarkan alasan penghakiman yang salah dan tidak disokong oleh sebarang bukti afidavit. Oleh itu, rayuan dibenarkan dengan kos.

Case(s) referred to:
Attorney General v. Arthur Anderson [1989] ECC 224 ***(refd)***
Bailli Group Plc v. Klockner Beteilingungs GmbH [2005] EWHC 1453 ***(refd)***
Beckkett Pte Ltd v. Deutsche Bank AG and Another [2011] 1 SLR 524 ***(refd)***
Berjaya Industrial Bhd & Anor v. Public Bank (L) Ltd & Ors [1995] 4 CLJ 504 HC ***(refd)***
Charles Ostenton and Co. v. Johnston [1942] AC 130 ***(refd)***
Excalibur Ventures LLC v. Texas Keystone Inc and Others [2012] 1 All ER 933 ***(refd)***
Government of Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 SC ***(refd)***
Insurance Company of the State of Pensylvannia v. Equitas Insurance Ltd [2013] EWHC 3713 ***(refd)***
Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***
Ledra Fisheries Ltd v. Turner [2003] EWHC 1049 ***(refd)***
Leong Poh Shee v. Ng Kat Chong [1965] 1 LNS 212 ***(refd)***
Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd [1987] 2 CLJ 290; [1987] CLJ (Rep) 160 SC ***(refd)***
Q & M Enterprise Sdn Bhd v. Poh Kiat [2005] 4 SLR 494 ***(refd)***
R v. Duke [1985] 6 WWR 386 ***(refd)***
Ratnam v. Cumarasamy & Anor [1964] 1 LNS 237 PC ***(refd)***
Reichhold Norway ASA v. Goldman Sachs [2000] 1 WLR 173
Rowstead Systems Sdn Bhd v. Bumicrystal Technology (M) Sdn Bhd [2005] 2 CLJ 465 CA ***(refd)***
Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd [2012] 9 CLJ 557 FC ***(refd)***
Tan Geok Lan v. La Kuan [2004] 2 CLJ 301 FC ***(refd)***
Virsagi Management (S) Pte Ltd v. Welltech Construction Pte Ltd and Another Appeal [2013] SGCA 50 ***(refd)***
Yusen Air & Sea Service (S) Pte Ltd v. KLM Royal Dutch Airlines [1999] 2 SLR(R) 955 ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 11 r. 4, O. 34 r. 2

Other source(s) referred to:
Chesire and North's Private International Law, 12th edn, pp 231-232

A *For the appellants - Balan Nair, Malini Subramaniam & Saw Wei Siang; M/s Thomas Philip*
For the 1st respondent - Saranjit Singh, Hoe Mei Lei & Dhiya Damia Shukri; M/s Saranjit Singh
For the 2nd respondent - Sanjeev Kumar & Najihah Farhana; M/s Sanjeev Kumar
For 4th to 7th respondents - Alice Loke; SFC

B *[Editor's note: For the High Court judgment, please see Huang Min & Ors v. Malaysian Airline System Berhad & Ors [2016] 1 LNS 919 (affirmed).]*

Reported by Sandra Gabriel

C **JUDGMENT**

Abdul Rahman Sebli JCA (majority):

[1] This was an appeal by the appellant Huang Min and 31 others, all Chinese nationals, who were dissatisfied with the decision of the Kuala Lumpur High Court dismissing their application for a stay of their action in
D the Kuala Lumpur High Court Suit No: WA-21NCVC-43-04-2016 ("the Malaysian suit") pending determination by the District Court of the United States of America ("the US") on the question of whether the US court has and will assume jurisdiction in the suits that they have filed in the US against the first to third respondents ("the US suits").

E **[2]** We heard and dismissed the appeal on 9 December 2016 by a majority decision, with my learned brother Justice Mohd Zawawi Salleh and I being in the majority whilst our learned brother Justice Vernon Ong Lam Kiat dissented. This then is our majority judgment.

F **[3]** The factual background of the case is as follows. On 8 March 2014 Malaysia Airlines aircraft with flight code MH370 ("flight MH370") departed from Kuala Lumpur International Airport *en route* to Beijing, China. Flight MH370 never arrived at its destination. It vanished along with all 239 passengers and crew on board. The appellants are the next of kin of
G the passengers of the ill-fated flight MH370.

[4] On 29 January 2015, the Government of Malaysia declared "MH370 an accident in accordance with the Standards of Annexes 12 and 13 to the Chicago Convention and that all 239 of the passengers and crew on board MH370 are presumed to have lost their lives."

H **[5]** On 4 February 2016, the appellants commenced a civil action against the first to third respondents under the Montreal Convention 1999 ("the Montreal Convention") in the District Court of the Southern District of New York for the wrongful death of the decedents on flight MH370. This was followed by two other suits against the first to third respondents
I in two other US District Courts on 5 March 2016.

[6] The first to third respondents sought and obtained an order for transfer and consolidation of the three US suits before one single judge. This order was decreed on 2 June 2016 by the District Court of Columbia. There is therefore only one US court that will hear and determine the three suits filed by the appellants against the first to third respondents in the US.

[7] The Malaysian suit, on the other hand, was filed in the Kuala Lumpur High Court on 4 March 2016. The fourth to seventh respondents are co-defendants in the Malaysian suit but not in the three US suits.

[8] Presently therefore, there are four separate suits filed by the appellants flowing from the accident involving flight MH370, namely:

(i) *Zhang et al v. MAS & Ors* – Filed on 4 March 2016 in the US;

(ii) *Huang Ming & Ors v. MAS & Ors* – Filed on 4 March 2016 in Malaysia;

(iii) *Huang et al v. MAS & Ors* – Filed on 5 March 2016 in the US; and

(iv) *Smith v. MAS & Ors* – Filed on 5 March 2016 in the US.

[9] The present appeal relates to suit number (ii) above where all seven respondents are the defendants. The progress of the Malaysian suit thus far is as follows:

(a) The pleadings are closed and the case is at the management stage;

(b) All the respondents have submitted to the jurisdiction of the Malaysian court and have filed their respective appearances;

(c) All the respondents have delivered their defences and the battle lines have been drawn;

(d) The appellants have sought and obtained an order for leave to issue and serve the writ out of jurisdiction under O. 11 r. 4 of the Rules of Court 2012 ("the Rules") on the third respondent (a foreign company);

(e) The third respondent had entered appearance; and

(f) Parties have all appeared for case management before the High Court.

[10] The appellants' case was that although they have filed three suits in the US against the first to third respondents in connection with the disappearance of flight MH370, it was necessary for them to file the Malaysian suit as a "protective writ" as the limitation period to commence action under the Montreal Convention is two years from the date of the incident.

[11] The appellants filed the Malaysian suit one month after filing the US suits, after having notice of the first to third respondents' intention to challenge the jurisdiction of the US court in the US suits. According to the

A appellants, the Malaysian suit was filed as a protective measure to circumvent the limitation period under the Montreal Convention in the event the first to third respondents were to succeed in their jurisdictional challenge in the US.

B **[12]** The appellants' concern was that if they did not file the protective writ in the Malaysian court and the US court were to rule that it is not seized with jurisdiction and will not assume jurisdiction in the US suits, there is a real danger that they will be left without any remedy for the loss of their next of kin who had perished in the accident involving flight MH370.

C **[13]** On 4 March 2016, ie, on the same day that they filed the first of the three US suits, the appellants amended the Malaysian suit to include the fourth to seventh respondents. They made their stand clear, however, that in the event the US court was to determine that it is seized with jurisdiction to hear the US suits, they will discontinue the Malaysian suit against the first to third respondents and will continue only against the fourth to D seventh respondents. It is clear that the appellants are treating the US suits against the first to third respondents as their primary action and the Malaysian suit involving all seven respondents as merely a protective action.

E **[14]** The appellants then applied for a stay of the Malaysian suit pending determination by the US court of the jurisdictional challenge mounted by the first to third respondents in the US suits. The application was dismissed by the learned Judicial Commissioner ("the learned JC"), hence the present appeal before us.

F **[15]** Essentially, the learned JC relied on the following grounds in dismissing the stay application:

(i) The protective nature of the writ in the Malaysian suit does not of itself give rise to special circumstances to justify a stay of proceedings, although it does provide a valid answer to the contention that the G Malaysian suit amounted to an abuse of the court process;

(ii) Having filed the action in Malaysia, the appellants must accept that the progress of the case is in the hands of the Malaysian court and the modern approach envisages the need to dispose of cases in an expeditious and economical manner;

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(iii) The US suits are at the beginning stage and the appellants can discontinue their action against the first to third respondents upon the determination of the jurisdictional challenge in the US suits but the Malaysian suit will still proceed against the fourth to seventh respondents;

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(iv) If stay was allowed, there would be serious prejudice to have the Malaysian suit hanging over the heads of the fourth to seventh respondents who are not parties to the US suits; and

(v) The balance of justice and convenience dictates that the stay application be refused in the particular circumstances of the case.

[16] In opposing the appellants' application, the first respondent's contention first and foremost was that the Malaysian suit is not in fact a protective writ, for the following reasons:

(a) The appellants' claim runs into 148 paragraphs against seven respondents with pleadings seeking reliefs and remedies against the seven respondents and that too, jointly and severally;

(b) The appellants' claim against the seven respondents cannot be viewed as anything but a substantive and primary claim as opposed to being merely protective as alleged;

(c) The appellants' causes of action against the fourth to seventh respondents in the Malaysian suit are not under the Montreal Convention and hence are different from the US suits; and

(d) The appellants had sought and obtained an order to issue and serve the writ on the third respondent out of jurisdiction, giving rise to the notion that the appellants are convinced that Malaysia is the proper forum for the determination of the disputes between the appellants and the third respondent, which is a foreign company.

[17] In the alternative, it was argued that even if the Malaysian suit can be viewed as a protective writ, it does not *ipso facto* entitle the appellants to a stay of proceedings. It was urged upon us to take cognizance of the following objective facts:

(i) Multiplicity of proceedings cannot amount to special circumstances on its own as it was the appellants themselves who instituted suits in both jurisdictions ("Having put his hand to the plough, he should continue till the end of the furrow");

(ii) Of the three US suits, only one was filed on the same day as the Malaysian suit whilst the other two were filed a day after the filing of the Malaysian suit;

(iii) In the Malaysian suit, only the first to third respondents are named as parties in the three US suits. An additional party, who is the third respondent's executive, is named in one of the US suits, ie, the Director-General of Civil Aviation, Malaysia, the fourth respondent.

(iv) The fourth to seventh respondents are not named as parties in the US suits;

(v) The causes of action in the Malaysian suit are wide-ranging, encompassing, *inter alia*, action against the government departments, and the appellants sought reliefs against all respondents jointly and/or severally;

(vi) The first to third respondents in the US suits are resisting jurisdiction on a *forum non-conveniens* challenge and raising the issue of immunity from suit (in relation to the first and second respondents) under the Foreign Sovereignty Immunity Act;

(vii) All seven respondents in the Malaysian suit have submitted to jurisdiction and have filed their respective defences;

(viii) The stage of the prosecution of the Malaysian suit is far more advanced than that of the three US suits;

(ix) The appellants have taken steps in the proceedings by attending numerous case management including the last case management before the High Court on 3 November 2016.

(x) The appellants had sought leave to serve the writ out of jurisdiction on the third respondent;

(xi) The policy of our legal system deprecates suspension of the prosecution of a claim brought in the Malaysian court where it would be against the expeditious, cost-saving and efficient disposal of cases;

(xii) There is forum shopping by the appellants as the appellants will continue to proceed with the Malaysian suit against the fourth to seventh respondents even if the US courts were to determine that they are seized with jurisdiction in the US suits;

(xiii) The first respondent had been put to expense and continues to face the pressures of litigation and court timetable;

(xiv) The first respondent had disclosed its defence and taken position in the proceedings;

(xv) In the event that the US court was to decide that it is seized with jurisdiction, a bifurcated trial in two jurisdictions involving one accident will have the witnesses going to and from the US and Malaysia to give evidence, in particular witnesses for the first and second respondents, not to mention the appellants themselves;

(xvi) The consequences of a stay to the first respondent is a serious consideration for the exercise of discretion;

(xvii) The exercise of good management of the concurrent sets of proceedings would necessarily involve the court finding the right balance of the competing policy considerations in the management of court proceedings;

(xviii) There is no nexus between the loss of lives on board flight MH370 and the US to justify asking the Malaysian court to halt the progress of its proceedings, and to defer to the determination and final decision on jurisdiction by the US court under the veil of comity of nations;

(xiv) It will be repugnant to the principles of comity for the appellants to suggest that the determination of the second respondent's liability under the MAS Act 2015, a Malaysian legislation, ought to be adjudicated and determined by the US court as opposed to the Malaysian court.

(xx) Public policy frowns upon such a suggestion and is an attempt to subordinate the Malaysian court to the US court;

(xxi) The aircraft was a Malaysian aircraft that departed from Kuala Lumpur and did not fly anywhere to or from the US;

(xxii) The carrier is a Malaysian company;

(xxiii) The appellants are Chinese citizens;

(xxiv) The potential witnesses and the respondents would be Malaysians and Chinese; and

(xxv) No basis preferred/advanced as to why the US is a preferred jurisdiction.

[18] As for the second respondent's objection to the appellants' application for stay, they were essentially the same as the grounds proffered by the first respondent. As such, we do not propose to set them out in this judgment.

[19] The fourth to seventh respondents' objection to the application for stay on the other hand was twofold. Firstly, that they are not parties to the US suits and therefore there was no reason to stay the proceedings. Secondly, if stay was allowed, they would be put at a disadvantage as they would not be able to proceed with interlocutory proceedings against the appellants.

[20] The first and second respondents' contention that the Malaysian court must not be subjugated to the US court under the veil of international comity is supported by the following authorities: *Ledra Fisheries Ltd v. Turner* [2003] EWHC 1049; *Klockner Holdings GmbH, Bailli Group Plc v. Klockner Beteilingungs GmbH* [2005] EWHC 1453; *Excalibur Ventures LLC v. Texas Keystone Inc and Others* [2012] 1 All ER 933; *Attorney General v. Arthur Anderson* [1988] ECC 224; *Bekkett Pte Ltd v. Deutsche Bank AG and Another* [2011] 1 SLR 524; [2010] SGHC 284; *Q & M Enterprise Sdn Bhd v. Poh Kiat* [2005] 4 SLR (R) 494.

[21] In response to the first to third respondents' grounds of objection to the stay application, the appellants advanced the following arguments. First the protective writ point. It was pointed out that the first and second respondents did not appeal against the learned JC's finding that the Malaysian suit is a protective writ.

[22] It was submitted that this put to rest the question of whether there was an abuse of process or forum shopping and that in the absence of any challenge against the finding, be it by way of cross-appeal or a fresh appeal, the first and second respondents were precluded from revisiting the issue.

[23] Second, the contention that the appellants had submitted to the jurisdiction of the Malaysian court by applying and obtaining leave to serve a notice of writ to be served out of jurisdiction on the third respondent (a foreign company). The appellants' answer was that they could not withhold service of the writ and statement of claim on the third respondent on the basis that it was a protective writ. This therefore necessitated the appellants to file an application for the notice of writ to be served out of jurisdiction on the third respondent.

[24] It was argued in the circumstances that the issue of whether the Malaysian suit is an abuse of process or anything other than a protective writ ought not to be considered by the court.

[25] Third, the issue of forum. The appellants' response was that the Montreal Convention provides for five fora in which the appellants could choose to institute their claim from. It is an undisputed fact that the appellants filed their case firstly in the US before filing the Malaysian suit. They have therefore chosen, at the outset, the forum in which they sought their remedies. The question of whether the US is an appropriate forum should be left to the US court to decide.

[26] It was submitted that it was inevitable for the appellants to seek other available outlets to protect their rights as the first and second respondents are raising the issue of jurisdiction in the US suits, and this approach is recognised in *Arthur Andersen (supra)* and *Virsagi Management (S) Pte Ltd v. Welltech Construction Pte Ltd and Another Appeal* [2013] SGCA 50.

[27] It is an established principle of law that the interest of justice will not be served by having two or more courts hearing the same dispute or each hearing only part of a larger, complex dispute: *Lesco Development Corp Sdn Bhd v. Malaysia Building Society Bhd* [1987] 2 CLJ 290; [1987] CLJ (Rep) 160; [1988] 2 MLJ 184.

[28] The appellants relied on *Berjaya Industrial Bhd & Anor v. Public Bank (L) Ltd & Ors* [1995] 4 CLJ 504; [1996] 5 MLJ 389 where Abdul Malek J (as he then was) adopted the following passage in *Chesire and North's Private International Law* (12th edn) at pp. 231-232:

> If litigation involving the same parties and the same issues is continuing simultaneously in two different countries, this is referred to as a case of *lis alibi pendens*. In such cases the issue facing the English court is not simply that of deciding to which of the alternative forum the plaintiff should have to go to bring his action. Instead, the choice is between, on the one hand, trial in England plus trial abroad (if a stay is granted). *It is very undesirable*

to have concurrent actions in England and abroad: this involves more expense and inconvenience to the parties than if the trials were held in merely one country; it can also lead to two conflicting judgments, with an unseemly race by the parties to be the first to obtain a judgment and to subsequent problems of estoppel. (emphasis added)

[29] Reliance was also placed on *Arthur Andersen (supra)*. In that case, the appellant brought a suit against the defendants in two jurisdictions, namely in New York and England. Through an application filed in the English court, the appellant sought to stay its English proceedings pending the determination of the New York proceedings. It was held that the English action should be stayed. In so deciding, the court took into account the following factors:

(a) The English proceeding was commenced to protect the action from being time-barred and therefore accepted the notion of a 'protective writ'; and

(b) It was a 'common sense matter' to await the question of jurisdiction in New York to be resolved before further steps were taken in the English action.

[30] It is also trite law that where a plaintiff files for a stay to await the determination of a jurisdictional challenge, the issue of *forum non conveniens* should not be a question to be determined: See *Yusen Air & Sea Service (S) Pte Ltd v. KLM Royal Dutch Airlines* [1999] 2 SLR(R) 955 where the following pronouncements were made:

It was appropriate to order a stay in *Arthur Andersen* because of the possibility that the New York courts might decline jurisdiction. If the English action had been struck out and the parties could not proceed in New York, it would certainly be unfair to deny the plaintiff of his right to have the dispute adjudicated in a court of law ... We agree with the views expressed in an article entitled *"Lis Alibi Pendens: Staying or Discontinuing Proceedings"* by Smart in [1990] LMCLQ 326 at p 329:

> **Where a plaintiff has commenced proceedings in England and in a foreign court, the plaintiff will generally be required to elect which action he wishes to pursue**. If the plaintiff chooses to pursue the matter abroad, the English action will normally be discontinued: where, however, there may be some obstacle to the foreign court's determining the case on its merits (for instance, a challenge to the jurisdiction of the foreign court, as in Arthur Andersen) the English court **may** merely order a stay of its own proceedings. (emphasis added)

[31] Fourth, the issue of multiplicity of proceedings. The appellants' answer was that there would be no multiplicity of proceedings if the US suits proceeded against the first to third respondents in the US while the Malaysian suit proceeded against the fourth to seventh respondents in

Malaysia after the determination of jurisdiction by the US court, as the causes of action against the fourth to seventh respondents are distinct from the causes of action against the first to third respondents.

[32] It was submitted that even if there was multiplicity, it would fall on the fourth to seventh respondents to show that this would occasion prejudice and vexation, which the fourth to seventh respondents failed to show.

[33] Fifth, the issue of public policy consideration. The appellants' response was that the fourth to seventh respondents did not, in the first place, file any affidavit to state that they would be prejudiced in a way that cannot be compensated by costs if a stay of the Malaysian suit was granted by the court. It was thus submitted that mere speculation of prejudice to the fourth to seventh respondents is not a valid ground for the learned JC to dismiss the stay application.

[34] The appellants stressed the point that it was well within the right of the appellants to bring an action in the US against the first to third respondents and an action in Malaysia against the fourth to seventh respondents, if they chose to do so, as the causes of action are different.

[35] It was further submitted that it was a misconception for the first and second respondents to contend that it would be repugnant to the principles of comity that the determination of the second respondent's liability under the Malaysian Airline System Berhad (Administration) Act 2015 ("the MAS Act") ought to be adjudicated and determined by the US court. This according to counsel would be putting the cart before the horse.

[36] It was also pointed out that the first and second respondents have not demonstrated at which stage the liability of the first and second respondents would be determined in the US, even if they can do so. It was submitted that the stay application did not, and will not determine the issue of whether the first and second respondents are liable under the MAS Act.

[37] These in gist were the competing arguments that were presented to us for our consideration. Having given careful consideration to the submissions of both sides and the surrounding circumstances of the case, we were not persuaded that the learned JC was wrong in refusing to grant a stay of the Malaysian suit.

[38] This appeal clearly involved the exercise of a discretion vested in the lower court. We were not vested with that discretion, sitting as we were in an appellate jurisdiction. Our power was merely to review the exercise of that discretion. The correct approach to be adopted by an appellate court in dealing with the exercise of such discretion has been explained by Lord Guest delivering the judgment of the Privy Council in *Ratnam v. Cumarasamy & Anor* [1964] 1 LNS 237; [1965] 1 MLJ 228, a decision on appeal from Malaysia, in the following terms at p. 229:

> The principles upon which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton & Co. v. Johnston* per Lord Wright at 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans v. Bartlam*). (emphasis added)

[39] There are, therefore, two situations where the exercise of the discretion can be assailed on appeal:

(a) Where the discretion has been exercised on a wrong principle and should have been exercised in a contrary way; or

(b) Where there has been a miscarriage of justice occasioned by the exercise of the discretion.

[40] Other than these two situations, the exercise of the discretion must not ordinarily be disturbed on appeal as the presumption is that the judge had exercised his discretion rightly. It is axiomatic that the exercise of discretion involves weighing up all sides and taking into account opposing points of view, separating the wheat from the chaff. It is a rational, sober, sound, sagacious and considered decision. It is never a split-second decision, much less a decision that is made on the spur of the moment in the heat of argument and without getting the facts right and without considering all relevant factors and circumstances.

[41] A miscarriage of justice in the exercise of a discretion arises when the mistaken, unfair or improper judicial act results in prejudice or injustice to the party affected by the decision. Proof of actual prejudice resulting from an error of law is not a prerequisite to a finding that a miscarriage of justice has occurred. A mere appearance that unfairness exists may be sufficient. This was the view expressed by Justice McClung of the Alberta Court of Appeal in *R v. Duke* [1985] 6 WWR 386 in reference to an appeal on the Canadian Criminal Code. We reproduce below what the learned judge said:

> ... the determination of whether a miscarriage of justice has occurred rests on broader considerations than those attaching to the demonstration of a substantial wrong. Proof of actual prejudice resulting from the error of law is not requisite to a finding that a miscarriage of justice has occurred. **It may be enough that an appearance of unfairness exists.** (emphasis added)

[42] Sitting in our appellate jurisdiction, we might have exercised the discretion differently from the learned JC, but that is not a valid ground to interfere with his decision. The following observations by Edgar Joseph Jr. SCJ delivering the judgment of the then Supreme Court in *Government of Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701 are relevant:

A

> It is settled law that the exercise of a discretion by the trial Judge will be interfered with by an appellate court only in exceptional circumstances but not otherwise. More particularly **the fact that an appellate Court might have exercised the discretion differently is totally beside the point and will not constitute a sufficient ground for overturning the Judge's decision.** (emphasis added)

B

[43] In submitting that there were no special or exceptional circumstances to justify the grant of a stay, learned counsel for the first and second respondents relied on *Rowstead Systems Sdn Bhd v. Bumicrystal Technology (M) Sdn Bhd* [2005] 2 CLJ 465, *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 and *Jasanusa (supra).*

C

[44] It was impressed upon us that over the past four years, court proceedings in Malaysia have 'metamorphosed' into ensuring that proceedings are conducted expeditiously, that costs are reduced, and that unnecessary delay is discouraged to minimise the burden faced by the courts and the parties: *Tan Geok Lan v. La Kuan* [2004] 2 CLJ 301; [2004] 3 MLJ 465; *Syed Omar Syed Mohamed v. Perbadanan Nasional Berhad* [2012] 9 CLJ 557; [2013] 1 MLJ 461. Reference was made to O. 34 r. 2 of the Rules.

D

[45] It was submitted that a stay would only impede the just, expeditious and economical disposal of the Malaysian suit. The Federal Court had occasion to deal with O. 34 of the Rules in *Syed Omar bin Syed Mohamed (supra)* where Zulkefli Ahmad Makinudin CJ (Malaya) (now PCA) said at p. 468 (CLJ); p. 567 (MLJ):

E

> It is to be noted O. 34 was a new addition to the RHC 1980 made in 2000 (see PU(A) 342/2000). It was amended again in 2009 (see PU(A) 237/2009). It provided for a radical change in approach to the prosecution of a case in court. An early recognition of this new regime under O. 34 where the court takes a proactive role in moving the place of litigation was made by the Federal Court when His Lordship Mohd Noor Ahmad FCJ observed in *obiter* in *Tan Geok Lan v. La Kuan @ Lian Kuan* [2004] 3 MLJ 465 at p. 473; [2004] 2 CLJ 301 at p 312 as follows:

F

G

> The significance of this procedure is that it marks a change from the traditional position under which progress of cases was left largely in the hands of the parties. Now, under the procedure the court controls the progress of cases by the exercise of its powers given to it to enable it, and not the parties, to dictate the progress of cases at the pre-trial stage, ensuring that the practices and procedures applicable during that stage are complied with promptly and not abused.

H

[46] In *Virsagi Management (S) Pte Ltd (supra)*, the Singapore Court of Appeal made the following observations at para. 36:

I

> On the other hand, if the plaintiff elects to pursue its claim in the overseas forum (instead of Singapore) but the defendant wants the proceedings to continue in Singapore, the latter may seek an anti-suit injunction from the

Singapore courts to prevent the plaintiff from carrying on with the foreign proceedings. The plaintiff's election does not, *ipso facto*, preclude the granting of such injunction. Where, however, the defendant is happy to have the dispute heard abroad, it would have (in substance) obtained the same outcome pursuant to an application to stay proceedings under the doctrine of *forum non conveniens*. It has been said that in such a situation the court will discontinue the local proceedings (rather than just grant a stay): see the English High Court decision of *Australian Commercial Research and Development Ltd v. ANZ McCaughan Merchant Bank Ltd* [1989] 3 All ER 65 ("*Australian Commercial Research*") at [70] as well as *Yusen Air* at [32] (citing Smart, *"Lis Alibi Pendens: Staying or Discontinuing English Proceedings"* [1990] LMCLQ 326 at 329)). However, we take the view that the court is not restricted to discontinuing the local proceedings, and may, in the appropriate circumstances, grant a stay of proceedings instead. This might be the case where the foreign court's jurisdiction is being challenged (see, for example, the English High Court decision of *Arthur Andersen & Co* The Independent (31 March 1988) and *Yusen Air* at [32]. Or where the action in Singapore is brought to obtain security by way of *Mareva* injunction or attachment of assets (see, for example, the Singapore High Court decision of *Multi-Code Electronics Industries (M) Bhd and another v. Toh Chun Toh Gordon and others* [2009] 1 SLR R 1000 ("Multi-Code Electronics").

[47] *Ledra Fisheries Ltd (supra)* is more on point, where it was decided that where the plaintiff voluntarily started proceedings in two jurisdictions, it would require special or exceptional reasons to be given before the court is prepared to grant a stay in favour of the plaintiff. It was also held that where the plaintiff voluntarily brought a suit in a jurisdiction in which the defendant does not dispute jurisdiction, the court would generally be slow to invoke its inherent powers to stay proceedings at the behest of the plaintiff. This fits in squarely with the facts and circumstances of the present case.

[48] There can be no argument that the uncertainty as to the direction in which the US court will rule on the jurisdictional issue raised by the first to third respondents in the US suits will negatively impact the expeditious disposal of the Malaysian suit. There is no reason why the progress of the Malaysian suit should be forestalled merely because the US court has yet to decide on the jurisdictional issue. The Malaysian court is not subordinate to the US court.

[49] It is true that there was no application by the first and second respondents to restrain the appellants from pursuing the US suits, nor was there a direction given by the High Court, by its own motion or by application, to order the appellants to elect their forum (*KLM Royal Dutch Airlines (supra)*) but this does not mean that the learned judge must as a matter of course grant the order for stay of the Malaysian suit.

[50] It is also true that the appellants had made their position clear that if the US court were to decide that it is seized with jurisdiction to hear the US suits and will assume jurisdiction, they will drop the Malaysian suit against the first to third respondents. But again this does not mean that the appellants are entitled as of right to a stay of the Malaysian suit.

[51] The simple truth is, the expeditious disposal of the Malaysian suit will be compromised if a stay were to be granted while waiting for the US court to decide on the jurisdictional issue. To compound the matter, there is no certainty as to when the jurisdictional issue will be finally determined by the US court.

[52] This is manifestly unfair to the respondents, particularly the fourth to seventh respondents. They are not even parties to the US suits, yet they are made to wait for the outcome of the jurisdictional issue raised by the first to third respondents in the US court. We found no merit in the appellants' contention that since the fourth to seventh respondents did not file any affidavit to show prejudice, they were precluded from raising the issue of prejudice. The fact that the Malaysian suit will be hanging over their heads for an indefinite period while waiting for the jurisdictional issue to be determined by the US court speaks for itself.

[53] In a stay application of this nature, the court is required to look at the matter globally in determining where the balance of justice lies. The question to ask is: Would the benefits to the applicant be outweighed by the disadvantages to the respondent, or would policy considerations in the management of court proceedings militate against the exercise of discretion in favour of a stay? (*Ledra Fisheries Ltd (supra); Insurance Company of the State of Pensylvannia v. Equitas Insurance Ltd* [2013] EWHC 3713; *Leong Poh Shee v. Ng Kat Chong* [1965] 1 LNS 212; [1966] MLJ 86; *Excalibur Ventures LLC and Arthur Andersen (supra)*).

[54] Given the facts and surrounding circumstances of the case and looking at the matter globally, we were unable to say with conviction that the learned judge had exercised his discretion on a wrong principle and that the discretion should have been exercised in a contrary way, or that there has been a miscarriage of justice: *Ratnam v. Cumarasamy (supra).* There can be no actual prejudice or even an appearance of unfairness when the appellants are being given every latitude to enforce their rights through the Malaysian suit where seven parties have been named as defendants as opposed to only three in the US suits, and no jurisdictional issue is involved.

[55] Further, if stay was granted, the disadvantages to the respondents would outweigh the benefits to the appellants. Nor do we think that policy considerations in the management of court proceedings would favour the grant of a stay. In fact, the contrary is true.

[56] While we consider as palpable the appellants' explanation that the purpose of filing the protective writ was to protect their rights under the Malaysian law in view of the jurisdictional challenge by the first to third respondents in the US suits, this does not constitute a sufficient ground to justify putting the progress of the Malaysian suit on hold.

[57] It was for all these reasons that this court by majority dismissed the appellants' appeal against the decision of the High Court dismissing their application for a stay of the Malaysian suit.

Vernon Ong Lam Kiat JCA (dissenting):

[58] The appeal herein relates to the decision of the Kuala Lumpur High Court dismissing the plaintiffs' application for a stay of proceedings of the plaintiffs' suit ("the Malaysian action") pending the determination by the United States District Court of the District of Columbia ("USDC") on the question of whether the USDC has and will assume jurisdiction to hear the plaintiffs' suit against Malaysian Airline System Berhad, Malaysia Airlines Berhad and Allianz Global Corporate and Specialty (the first to third defendants respectively and hereinafter referred to as "the common defendants") in the United States of America ("the USA action").

[59] The appeal was heard on 9 December 2016 and dismissed by a majority decision of my learned brothers Justices Mohd Zawawi Salleh and Abdul Rahman Sebli JJCA. I took the dissenting view that the appeal should be allowed. The following are my grounds of decision.

[60] In this judgment, the parties shall be referred to as they were in the court below.

Salient Background Facts

[61] On 8 March 2014, Malaysia Airlines flight MH370 departed from Kuala Lumpur International Airport bound for Beijing, China. Flight MH370 did not arrive at its destination. On 29 January 2015, the Malaysian Government announced that all 239 of the passengers and crew on board flight MH370 are presumed to have lost their lives.

[62] On 4 February 2016, the plaintiffs filed the USA action against the common defendants in the District Court of the Southern District of New York for the wrongful death of the decedents on flight MH370.

[63] Subsequently, the plaintiffs filed the Malaysian action as a protective writ against the common defendants just four days prior to the onset of limitation. On 4 March 2016, the plaintiffs amended the Malaysian action to include the Director General of Civil Aviation Malaysia, the Department of Civil Aviation Malaysia, the Royal Malaysian Air Force and the Government of Malaysia (the fourth to the seventh defendants respectively).

[64] The plaintiffs then filed an application at the Kuala Lumpur High Court to stay proceedings pending a determination by the USDC on whether it has jurisdiction to hear cases commenced in the United States of America by the plaintiffs.

Findings Of The High Court

[65] The learned Judicial Commissioner (JC) accepted that the Malaysian action was a protective writ. It was filed just four days prior to the onset of limitation in order to preserve the plaintiffs' cause of action in Malaysia.

[66] The learned JC found (i) that the protective nature of the Malaysian action does not of itself give rise to special circumstances although it provides a valid answer to the argument that the Malaysian action amounted to an abuse of the court's process, and (ii) that the prevention of multiplicity of actions is a valid public policy consideration.

[67] The learned JC also considered the need for cases to be disposed of in an expeditious and economical manner; and the potential prejudice that may be occasioned to the fourth to seventh defendants in having the Malaysian action hanging over their heads for an uncertain duration pending the disposal of the jurisdictional hearing in the USA without which they are not parties.

[68] Lastly, the learned JC took the view that (i) a court must balance different and often competing policy considerations, and (ii) the exercise of judicial discretion on whether or not to grant a stay is dependent on the factual circumstances of each case (*AG v. Arthur Anderson & Co* [1989] ECC 224). In the result, the learned JC held that the balance of justice and convenience lies in refusing the application for stay.

Submission Of Counsel

[69] The arguments of learned counsel for the plaintiffs may be summarised as follows:

(i) The Malaysian action was only filed as a result of the first and second defendants' jurisdictional challenge in the United States action;

(ii) None of the defendants has shown how they are prejudiced by a stay of proceedings;

(iii) The fourth to seventh defendants have not taken any position as they have not filed any affidavit in opposition to the plaintiffs' stay application;

(iv) The fact that the Malaysian action is a protective writ itself amounts to special circumstances (*Ledra Fisheries Ltd & Ors v. Turner & Ors* [2003] EWHC 1049 (Ch));

(v) *Arthur Anderson (supra)* is distinguishable on the facts; and

(vi) A similar stay application was filed by the common defendants in the USA action.

[70] In reply, learned counsel for the first defendant argued firstly, that the learned JC had considered the matter globally. The learned JC had applied principles in *Arthur Anderson (supra)* in his assessment of the facts in deciding not to grant a stay of proceedings. Second, it was contended that special circumstance is not pivotal on the fact alone; the fact that the Malaysian action is a protective writ. Third, the learned JC found that the Malaysian action was filed at least partly as a protective writ because he took cognizance of the fact that the fourth to seventh defendants are not parties in the USA action. Lastly, the learned JC correctly rejected the plaintiffs' argument that the stay of proceedings was to prevent multiplicity of proceedings.

[71] Learned counsel for the second defendant argued that the cases cited by the plaintiffs only to cases where the parties are the same in both sets of proceedings. In this case, there are additional defendants in the Malaysian action. Further, a stay of proceedings would cause prejudice to the second defendant as it would be prevented from filing an application to strike out the writ. Lastly, granting a stay of proceedings would be contrary to public policy as it would delay the expedient disposal of the Malaysian action.

[72] Learned Senior Federal Counsel appearing for the fourth to seventh defendants argued that they are not parties in the USA action. As such, the plaintiffs' argument that a stay would prevent multiplicity of proceedings would not apply. If a stay of proceedings is granted, there is no indication how long the USA action will take. A stay would also tie their hands from filing any interlocutory applications in the Malaysian action.

Decision

[73] The court's jurisdiction to grant a stay of proceedings is discretionary in nature and the exercise of such discretion must be founded on established judicial principles.

[74] In the circumstances of this case, the relevant principles which guide the court in the exercise of its discretion to stay proceedings include the following:

(i) As a general rule, no stay of proceedings should be granted in a situation where the claimant voluntarily started both sets of proceedings (*Ledra (supra)*);

(ii) The court has a wide discretion to stay proceedings, but in circumstances where the claimant itself has brought a claim against the same defendants for essentially the same relief arising out of the same facts in two different jurisdictions, a stay should only be granted in special, rare or exceptional circumstances (*Ledra (supra)* paras. 14 and 38; *Reichhold Norway ASA v. Goldman Sachs* [2000] 1 WLR 173 at 179-180; *Excalibur Ventures LLC v. Texas Keystone Inc & Ors* [2012] 1 All ER (Comm) 933);

(iii) Even where there are such reasons for a stay, a stay should only be granted if the benefits of doing so clearly outweigh any disadvantage to the other party (*Reichhold (supra)* at 180);

(iv) A stay will not, at least in general, be appropriate if the other proceedings will not even bind the parties to the action stayed, let alone finally resolve all the issues in the case to be stayed (*Klockner Holdings Gmbh v. Klockner Beteiligungs Gmbh* [2005] EWHC 1453 (Comm); and

(v) A stay will not, at least in general, be appropriate if the parties to the other proceedings are not the same (*Klockner (supra)*).

[75] As this appeal is from the exercise of discretion in refusing to grant a stay of proceedings, the applicable principles when the appeal is from the exercise of discretion are best stated by Viscount Simon LC in *Charles Ostenson and Co v. Johnston* [1942] AC 130, 138-139:

> The law as to reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that rises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified. This matter was elaborately discussed in the decision of the House in *Evans v. Bartlam* [1937] AC 473, where the proposition was stated by my noble and learned friend, Lord Wright as follows: 'It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong.
>
> But the court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The court must if necessary examine anew the relevant facts and circumstances in

order to exercise a discretion by way of review which may reverse or vary the order. Otherwise in interlocutory matters the judge might be regarded as independent of supervision. Yet an interlocutory order of the judge may often be of decisive importance on the final issue of the case, and one which requires a careful examination by the Court of Appeal. Thus, in *Gardner v. Jay* [1885] LR 29 Ch. D 58 Bowen LJ in discussing the discretion of a judge as regards mode of trial says:

> That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it it will be reviewed.

[76] In this instance, it must be appreciated that the learned JC's finding that the Malaysian action is a protective writ is a specific finding. As the defendants did not appeal against this finding, the hearing of the appeal must be premised on the basis that the Malaysian action is a protective writ. Consequent thereon the question of whether there was an abuse of process or forum shopping is a *non sequitur*. However, the learned JC went on to hold that in consonance with modern approach of active judicial management of cases, the plaintiffs will necessarily have accepted that the progress of the Malaysian action is now placed in the hands of the court. The learned JC further opined that the USA action is at a very nascent stage of proceedings and that there is nothing to prevent the plaintiffs from discontinuing the Malaysian action against the common defendants upon the plaintiffs obtaining a favourable outcome on the jurisdictional question before the US court. The learned JC then took the view that the balance of justice and convenience lies in refusing the application for stay.

[77] It has been accepted that an exceptional case may be made out where the proceedings sought to be stayed were stated purely to protect the claimant's limitation position (*Ledra Fisheries (supra)*, *Arthur Anderson (supra)*). It follows that once the court had made a finding that the Malaysian action is a protective writ, the requirement of special circumstances has been satisfied.

[78] In *Arthur Anderson (supra)*, the plaintiff commenced their primary proceedings in the New York court, but also issued writs in England to guard against the contingency that a successful attack would be mounted on the jurisdiction of the New York court, leaving them with claims in England which would be time-barred. The defendants applied to bring the New York proceedings to an end, on the alternative grounds that the court had no jurisdiction over the parties or the subject matter, and that in any event the New York court was *forum non conveniens*. Pending the outcome of the defendant's application to stay the New Yok action, the plaintiff filed an application at the English court to stay the English proceedings pending

A the determination of the New York proceedings. The English High Court allowed the plaintiff's application to stay the New York action. The defendants' appeal to the English Court of Appeal was dismissed. As to the approach to be taken, Mustill LJ said at para. [13]:

> The question for the learned judge, and for us also when reviewing his
B decision, is to my mind no more than this, whether the good management of the concurrent sets of proceedings clearly requires the English Court, in charge of one set of those proceedings, to decree that a temporary halt should be called – temporary, because we must wait to discover what the American court is going to do. All agree that, if the American action ultimately fails for want of jurisdiction, the English action will resume
C where it has left off, and that, if the American action proceeds, it is in practice inevitable that the English action will either be left to wither informally, or will formally be made subject to an indefinite stay.

[79] The facts in *Arthur Anderson (supra)* are on all fours with the present case. In that case, the pleadings are closed and the issue was whether the
D action should come to a standstill at once to await the outcome of certain proceedings in the United States. In the present case, a similar application was filed by the common defendants in the USA action. The parties in the USA action have been given timelines for the discovery process to determine the issue of jurisdiction. It is pertinent to note that the plaintiffs'
E application is also for a stay of proceedings pending the resolution of the issue on the jurisdiction in the USA action.

[80] I have given careful consideration to the judgment of the learned JC. In my respectful view, the learned JC erred in law and in fact in holding that the protective nature of the Malaysian action does not of itself give rise to
F special circumstances, and in further balancing the policy considerations between an expeditious disposal of the case and the prevention of multiplicity of proceedings. The stay that was sought was only an interim stay pending the outcome of the jurisdictional issue in the USA action. Although it is not possible to predict how long before it will be before the
G issue is finally adjudicated in the USA action, the time scale is not entirely in the air because the parties have been given timelines for discovery to determine the issue of jurisdiction. If the issue is decided in favour of the common defendants, then the Malaysian action will resume; if the issue is decided in favour of the plaintiffs, then the Malaysian action will either be
H discontinued or subject to an indefinite stay against the common defendants.

[81] Insofar as the fourth to seventh defendants are concerned, it is not disputed that they did not file any affidavit in opposition to the plaintiffs' application for stay of proceedings. I am bound to agree with the submission of learned counsel for the plaintiffs that the fourth to seventh defendants have
I not taken any position to oppose the stay application. In his judgment,

however, the learned JC considered "the potential prejudice that may be occasioned to the fourth to seventh defendants in having the Malaysian action hanging over them for an uncertain duration". In the absence of any affidavit in opposition, there is no material before the learned JC to support or justify his finding that potential prejudice may be occasioned to the fourth to seventh defendants. Further, the learned JC failed to appreciate that the causes of action against the fourth to seventh defendants are distinct from the common defendants. In my respectful view, the learned JC had failed to direct his mind to the fact that no affidavit in opposition was filed by the fourth to seventh defendants. In so doing, the learned JC made an unwarranted deduction based on an erroneous judicial reasoning which was unsupported by any affidavit evidence.

[82] For the foregoing reasons, I would allow the appeal with costs.